A

Etiqa Takaful Bhd v Ambrose ak Jewon

B HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24–24/3 OF 2017
YEW JEN KIE J
10 JULY 2017

C *Civil Procedure — Parties — Addition of new party — Applicant filed originating summons for declaratory order that insurance policy which covered insured vehicle at material time of accident between respondent and intended intervener void and unenforceable — Intended intervener applied for order that*
D *leave be granted for intended intervener to be added as party or co-respondent to proceedings — Whether intended intervener had locus standi in originating summons*

On 2 September 2012, an accident occurred between the intended intervener's
E vehicle and the respondent's vehicle which was covered by the applicant's insurance policy ('the said policy'). Consequently, the intended intervener commenced a legal suit ('the SC suit') against the respondent. While the SC suit was still pending, the applicant filed originating summons ('encl 1') for a declaratory order ('the DO') that the said policy which covered the insured
F vehicle at the material time of the alleged collision was void and unenforceable. In the present application ('encl 8'), the intended intervener applied for an order that leave be granted to the intended intervener to be added as a party/co-respondent to the proceeding and a stay to be granted on the hearing of the originating summons. The issue arose was whether the intended
G intervener had locus standi or legal interest in the originating summons to intervene.

Held, allowing encl 8 with costs in the cause:

(1) In the present case, there was no question that the said DO sought in the
H originating summons in encl 1 would adversely affect the enforcement of the judgment which the intended intervener might obtain in the SC suit in that the applicant, having complied with the proviso as regard service of the originating summons and upon obtaining the said DO sought, would not have to pay any money under the said policy which had been
I declared null and void. It would literally take away the third party's right provided under s 96(1) of the Road Transport Act 1987. This clearly gave the intended intervener an interest in the originating summons and being the 'the plaintiff' in the SC suit, not only was he entitled to be served with a copy of the originating summons within seven days after the

commencement of the originating summons, he was also entitled, as of right, to be made a party and be heard on the matter in originating summons (see para 23).

[Bahasa Malaysia summary

Pada 2 September 2012, kemalangan berlaku di antara kenderaan pencelah dan kenderaan responden yang mana dilindungi oleh polisi insurans pemohon ('polisi tersebut'). Akibatnya, pencelah tersebut memulakan tindakan undang-undang ('tindakan SC') terhadap responden. Sementara tindakan SC masih lagi belum didengar, pemohon memfailkan saman pemula ('lampiran 1') untuk perintah perisytiharaan ('PP') bahawa polisi yang melindungi kenderaan yang diinsuranskan pada masa perlanggaran yang didakwa adalah batal dan tidak boleh dikuatkuasakan. Dalam kes permohonan ini ('lampiran 8') pencelah memohon untuk perintah bahawa kebenaran diberikan kepada pencelah untuk dimasukkan sebagai pihak/responden bersama untuk prosiding dan penangguhan diberikan atas pendengaran saman pemula. Isu berbangkit adalah sama ada pencelah mempunyai locus standi atau kepentingan dari segi undang-undang dalam saman pemula untuk mencelah.

Diputuskan, membenarkan lampiran 8 dengan kos di dalam kausa:

(1) Dalam kes ini, tidak terdapat persoalan bahawa PP yang dipohon di dalam saman pemula dalam lampiran 1 akan menjejaskan penguatkusaan penghakiman yang mana pencelah mungkin memperolehi di dalam tindakan SC di mana pemohon, setelah mematuhi peruntukan berkaitan penyerahan saman pemula dan setelah memperolehi PP yang dipohon, tidak perlu untuk membayar apa-apa wang di bawah polisi tersebut yang mana telah diisytiharkan batal dan tak sah. Ia secara literal mengambil hak pihak ketiga yang diperuntukkan di bawah s 96(1) Akta Pengangkutan Jalan 1987. Ini jelas memberi pencelah berniat kepentingan dalam saman pemula dan sebagai 'the plaintiff' dalam tindakan SC tersebut, bukan sahaja dia berhak untuk diserahkan dengan salinan saman pemula dalam masa tujuh hari selepas permulaan saman pemula, dia juga berhak, sebagai hak, dibuat sebagai pihak dan didengar atas perkara dalam saman pemula (lihat perenggan 23).]

Notes

For cases on addition of new party, see 2(4) *Mallal's Digest* (7th Ed, 2017 Reissue) paras 6884–6891.

Cases referred to

Pacific & Orient Insurance Co Berhad v Azhar Azizan; Mohd Asyraf Yusoff, (Intervener) [2014] 1 LNS 1097, HC (refd)

Pacific & Orient Insurance Co Bhd v Goh Cheng Loong & Ors [2013] MLJU 1612, HC (refd)
Pacific & Orient Insurance Co Berhad v Kumari a/p Nadason & Anor [2014] MLJU 1864, CA (refd)
Pacific & Orient Insurance Co Berhad v Mohd Asri Che Muda; Mohd Soqimie Md Daud Seorang Budak Yang Diwakili Oleh Bapanya Dan Wakil Sahabat Md Daud Desa & Ors (Intervener) [2013] 1 LNS 1084, HC (refd)
Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi & 4 Ors [2017] MLJU 1019; [2016] 1 LNS 1663, CA (refd)

Legislation referred to

Road Transport Act 1987 ss 91(4), 96(1), (3)
Rules of Court 2012 O 35 r 1(2)

Shally Heng Wek Yee (Lee Jin Wen and Chung Jing Kuang with her) (David Allan Sagah & Teng Advocates) for the applicant.
Abdul Rahman bin Mohamad Hazmi (Idris Buang & Assoc) for the respondent.
Sarbjit Singh Khaira (Catherine ak David with him) (Khaira & Co Advocates) for the intended intervener.

Yew Jen Kie J:

[1] Vide notice of application dated 7 April 2017 (encl 8), the intended intervener applied for an order that leave be granted to the intended intervener to be added as a party/co-respondent to the proceeding and a stay to be granted on the hearing of the originating summons until the court orders otherwise.

BACKGROUND FACTS

[2] Vide the originating summons in encl 1, the applicant applied for a declaratory order that the insurance through Certificate No TGPC-PC195025-BRTQKVCH ('the said policy') covering the period from 30 July 2012–29 July 2013 and which covered the insured vehicle at the material time of the alleged collision was void and unenforceable ('the said DO').

[3] On 2 September 2012, an accident occurred between the intended intervener's vehicle and the vehicle of the respondent which was covered by the said policy.

[4] The intended intervener commenced a legal suit vide Sessions Court No KSN-A53KJ-26/2 of 2016 ('the SC suit') against the respondent.

[5] While the SC suit was still pending in the sessions court, the applicant filed the originating summons in encl 1. A

[6] The intended intervener filed the present application in encl 8 which is opposed by the applicant. B

WHETHER THE INTENDED INTERVENER HAS LOCUS STANDI OR LEGAL INTEREST IN THE ORIGINATING SUMMONS TO INTERVENE? C

[7] In opposing encl 8, the applicant argued that the intended intervener has no locus standi or legal interest in the originating summons to be added as a party on the following grounds:

(a) the originating summons is seeking a declaration that the said policy is void and unenforceable and the intended intervener is not privy to the contract of the said policy; D

(b) the originating summons is premised on the breach of the terms and condition of the said policy which amount to breach of the condition precedent and the respondent's breach of the condition precedent amounts to a breach of duty of *uberrimae fidei* (utmost good faith) and the intended intervener is not a party to the contract of the said policy between the applicant and the respondent; and E

(c) the suit is still on going and judgment has not been given yet. Hence, the intended intervener cannot claim legal interest to the originating summons, citing *Pacific & Orient Insurance Co Berhad v Mohd Asri Che Muda; Mohd Soqimie Md Daud Seorang Budak Yang Diwakili Oleh Bapanya Dan Wakil Sahabat Md Daud Desa & Ors (Intervener)* [2013] 1 LNS 1084 and *Pacific & Orient Insurance Co Berhad v Azhar Azizan; Mohd Asyraf Yusoff, (Intervener)* [2014] 1 LNS 1097. F G

THE LAW

[8] As s 96(1) and (3) of the Road Transport Act ('the RTA') is material for the consideration of this application, it is reproduced below: H

> 96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in I

A respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

...

B (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that C action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

D

[9] By the express provision in s 96(1) of the RTA, the third-party right is statutorily secured in that, notwithstanding that the insurer may be entitled to void or cancel, or may have voided or cancelled the insurance policy, the insurer E is mandatorily bound to satisfy any judgment upon being served with a certificate of insurance under s 91(4) of the RTA.

[10] In order for the insurer to be entitled to the benefit of the declaratory order annulling the insurance policy provided under sub-s (3) in respect of any F judgment obtained by the third-party in the proceeding against the insured, the insurer must, before or within seven days after the commencement of the declaratory order action (as provided in the proviso), give notice of the action to the person 'who is the plaintiff in the proceeding specifying the grounds on which he proposed to rely, and any person to whom notice of such an action is G so given who shall be entitled if he thinks fit to be made a party thereto'.

[11] In *Pacific & Orient Insurance Co Bhd v Goh Cheng Loong & Ors* [2013] MLJU 1612 (referred to in *Pacific & Orient Insurance Co Berhad v Kumari Alp Nadason & Anor* [2014] MLJU 1864), it was decided that for the purpose of H s 96(3) of the RTA, liability is incurred only after judgment is given against the insured person. In other words, liability does not arise from the time of the accident, but upon a judgment being obtained.

THE COURT'S CONSIDERATION

I

[12] The applicant takes the stand that the intended intervener has no locus standi nor legal interest and, therefore, he cannot apply to be added as a party to the originating summons before the liability had been incurred and the SC suit is still pending, citing *Pacific & Orient Insurance Co Berhad v Mohd Asri*

Che Muda; Mohd Soqimie Md Daud Seorang Budak Yang Diwakili Oleh Bapanya Dan Wakil Sahabat Md Daud Desa & Ors (Intervener), and *Pacific & Oriental Insurance Co Berhad v Azhar Azizan; Mohd Asyraf Yusoff (Intervener).*

[13] In *Pacific & Orient Insurance Co Berhad v Mohd Asri Che Muda; Mohd Soqimie Md Daud Seorang Budak Yang Diwakili Oleh Bapanya Dan Wakil Sahabat Md Daud Desa & Ors (Intervener),* the proposed interveners applied to intervene in the originating summons, after the plaintiff therein had obtained the declaratory order and sought to set aside the said declaratory order granted by the court against the defendant therein. Neither the notice of the originating summons nor affidavit in support were served on the proposed intervener. The High Court held, inter alia:

> 11. It is to noted that the proviso to s 96(3) of the Act grants intended interveners, the locus to intervene only in situations where the third party claimants/plaintiffs has already obtained judgment against an insured. If the insured having notice of the judgment obtained against its insured, intends to apply to declare the judgment obtained, the insured has a duty under s 96(3) of the Act, to serve on the successful third party claimants/plaintiffs, all relevant papers and pleadings relating to the application to declare the insurance policy in question, void and enforceable, before or within seven days of the initiation of the declaratory application, failing which the insure cannot avail, itself to the proviso of s 96(3) of the Act.
>
> 12. In the instant case, the said declaratory order was obtained on 27 March 2013 before the said suit was completed. As such there was no duty on the part of the plaintiff to serve all the relevant papers on the proposed interveners.
>
> 13. This court finds that proposed interveners have no right to intervene as the instant case is a matter between the plaintiff and the defendant involving a contract of insurance and the proposed Interveners are not privy to the said contract of insurance.

[14] In *Pacific & Oriental Insurance Co Berhad v Azhar Azizan; Mohd Asyraf Yusoff (Intervener)*, the intended intervener sought to intervene and set aside the declaratory order annulling the insurance policy obtained by the plaintiff/insurer. In dismissing the application, the High Court held:

> 28. Therefore this court's construction is that the intended intervenor's legal interest to intervene only comes into existence if and when he has obtained judgment against the insured after which date if the insurer intends to apply to declare the policy void and unenforceable against the insured, the insurer would also have to serve all the cause papers on the intended intervenor. Once the intended intervenor had obtained judgment against the insured, he therefore would then have a legal right to intervene as he could then claim a legal interest in the insurers application for a declaration (as regards legal interest see *Kumarasamy Pillai Govindavaju @ K Govindaraju a/l Kumarasamy Pillai & Ors v Vijayasundram a/l Sambantham Mudalir & Anor* [2010] 4 MLJ 567; [2009] 1 LNS 1722 and *Pegang Mining Co Ltd v Chong Sam & Ors* [1969] 2 MLJ 52; [1968] 1 LNS 96).

29. In this instant case the declaratory order dated 14 May 2013 was obtained before the conclusion of the civil suit in Sungai Petani Sessions Court Civil Action No 53–954–08 of 2011 and therefore there was no obligation on the part of the insurer to serve the cause papers relating to a matter between the insured and the insurer, upon the intended intervenor. Furthermore it's the court's decision that the intended intervenor had not yet derived a legal interest that would entitle him to intervene as the matter is purely between the insurer and the insured.

30. As the declaratory order of 14 May 2013 merely declares the insurer's rights and cannot be used to enforce its right, it was therefore necessary for the insurer to obtain the order so as to declare its rights against the insured. This reinforces the courts view that encl 3 is purely a matter between the insurer and the insured and therefore this court ought not to entertain the intended intervenor's application in encl 7. Therefore it is the court's finding that if and when the intended intervenor did obtain judgment against the insured it could then proceed to recover the judgment it had obtain by the recovery action against the insurer by virtue of s 96(1). With the declaratory order, the insurer could seek reimbursement from the insured of the judgment sum as and when it is paid to the intended intervenor.

[15] It is worth mentioning that in the Court of Appeal's case of *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi & 4 Ors* [2017] MLJU 1019; [2016] 1 LNS 1663, counsel for the appellant had strenuously argued before the Court of Appeal that the Court of Appeal is bound to follow the decision of the High Court in *Pacific & Oriental Insurance Co Berhad v Azhar Azizan; Mohd Asyraf Yusoff, (Intervener)*. In rejecting this argument, the Court of Appeal expressed serious disagreement with the view of the High Court, namely:

(a) the intended intervenor could not apply to set aside the order pursuant to O 35 r 1(2) of the Rules of Court 2012 since the entity had a specific remedy provided by s 96(1) of the RTA to file for recovery action against the insurer;

(b) the intended intervener's legal interest, if any, to intervene only come into existence when a judgment has been entered against the insured; and

(c) the declaratory order was obtained before the trial at the sessions court was concluded and accordingly there was no obligation on the insurer to serve any cause papers on the intended third-party intervener since the later had not derived any legal interest against the insurer; the proceedings was merely between the insurer and the insured.

[16] Accordingly, the Court of Appeal in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi & 4 Ors*, held:

[33] Accordingly, in our view, the conclusions of the learned Judge in *Azhar*'s case that the plaintiff(s) had no legal interest to intervene until a judgment was secured in their favour and/or there was no right to be served any cause papers until

conclusion of the trial in the pending suit was clearly made per incuriam and in total disregard of the express terms in the relevant s 96(3) of the RTA. A

[17] In light of the above decision of the Court of Appeal in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi & 4 Ors,* it is clear that the applicant's reliance on *Pacific & Oriental Insurance Co Berhad v Azhar Azizan; Mohd Asyraf Yusoff, (Intervener)* and *Pacific & Orient Insurance Co Berhad v Mohd Asri Che Muda; Mohd Soqimie Md Daud Seorang Budak Yang Diwakili Oleh Bapanya Dan Wakil Sahabat Md Daud Desa & Ors (Intervener)* is misplaced. B

C

[18] In *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi & 4 Ors*, the appellant (insurer) commenced an action seeking declaratory order to annul the insurance policy under s 96(3) of the RTA (*saman pemula 1*). The cause papers related to *saman pemula 1* were served by the appellant on the fifth respondent, the insured. The fifth respondent did not oppose the said application. The declaratory order under s 96(3) of the RTA was obtained before the liability was incurred. Judgment was subsequently granted to the first, second, third and fourth respondents who then applied to the High Court to quash the said declaratory order (*saman pemula 2*), which was allowed by the High Court. D E

[19] On appeal, the two issues for determination before the Court of Appeal were:

(a) whether the first, second and third respondents had sufficient interest to commence *saman pemula 2* to seek and negate the effect of the declaratory order obtained by the appellant; and F

(b) whether on a proper interpretation of s 96(3) of the RTA, in particular the Proviso thereto, it was incumbent upon the appellant to give notice to the first, second and third respondents before or within seven days after commencement of *saman pemula 1* and, if so, whether this had been complied with by the appellant. G

[20] The Court of Appeal in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi & 4 Ors*, held thus: H

> [19] At the outset it needs to be appreciated that the declaratory order sought by the appellant in *saman pemula 1* was primarily intended to nullify the insurance policy pursuant to which the appellant was obliged under s 96(1) to meet and satisfy any judgment that *may be* secured by the first, second and third respondents (in their capacity as plaintiffs in the Selayang Sessions' proceedings) arising from the alleged accident involving the insured vehicle, motorcycle No WFE 1937. This definitely, in our view, vested in the first, second and third respondents sufficient interest in the outcome of the *saman pemula 1* proceedings taken by the appellants, I

notwithstanding that the insurance policy was a contract only between the appellant and the fifth respondent.

[20] This interest of the first, second and third respondents was statutorily and expressly recognised by virtue of the terms of the *proviso* to s 96(3) of the RTA. Any third party (like in this instance, the first, second and third respondents as plaintiffs) bringing a claim in court involving a vehicle (the subject of the mandatory third party risk insurance under RTA) was a recognised party named in the *proviso* to s 96(3) of the RTA as being entitled to be notified by the insurer (in this case the appellant) before or within seven days of the commencement of any proceedings under s 96(3) of the RTA to declare the relevant insurance policy to be void and unenforceable. such notice, it would also be noticed, required the appellant *to specify the grounds* that would be relied by the insurer in such an application.

[21] it was also most significant to note that in the proviso itself it was spelt out that such third party (plaintiff) if duly given the stipulated notice (with the grounds being relied upon) *was entitled as a matter of right* (at the sole option of such third party) be made a party to the proceedings brought by the insurer.

[22] On the facts of this case, there was no issue that the appellant had not served the requisite notice on the first, second and third respondents as stipulated in the proviso. The declaratory order obtained by the appellant under saman pemula 1 was clearly in violation of the provisions of s 96(3) of the RTA. The appellant's omission therefore amounted to not just an infringement of that statutory provisions but had the effect of denying the first, second and third respondents of their right to be made a party and be heard on the matter in saman pemula 1. There was no two ways about this. It was our view that if the relevant cause papers had been served by the appellant, it would have satisfied the two limbs of the requirement, namely, of notice of the saman pemula 1 proceedings and also of the grounds that was being relied upon by the appellant in such an application.

[32] We had also pointed out earlier that the closing words of the *proviso* to s 96(3) of the RTA vested a right in law on such plaintiff(s) in a pending action against an insured, if they the plaintiff(s) thought fit *to be even made a party* to the proceedings seeking the declaratory order under s 96(3) of the RTA itself. The failure of the party seeking a declaration under s 96(3) of the RTA to give such requisite notice of that proceedings (together with the grounds being relied upon) to such relevant plaintiff(s) was most definitely a denial of an existent legal interest of the plaintiff(s) recognised by statute. Clearly therefore such interest was not dependant on the plaintiff(s) securing first a judgement in their favour in a pending suit against the insured. (Emphasis added.)

[21] It is undisputed fact that in this present case the applicant herein had served the notice of the originating summons on the intended intervener.

[22] Although the first, second and third respondents in *Pacific & Orient Insurance Co Berhad v Rasip bin Hamsudi & 4 Ors*, were not served with the notice of the originating summons when the appellant was applying for the declaratory order to nullify the insurance policy, I believe the pronouncement that s 96(1) has vested in the third-party sufficient right in the outcome of the

declaratory order action taken out by insurer notwithstanding that the insurance policy is a contract only between the insurer and the insured, applies to this case.

[23] In this present case, there is no question that the said DO sought in the originating summons in encl 1 will adversely affect the enforcement of the judgment which the Intended intervenor may obtain in the SC suit in that the applicant, having complied with the proviso as regard service of the originating summons and upon obtaining the said DO sought, will not have to pay any money under the said policy which had been declared null and void. It will literally take away the third party's right provided under s 96(1). This clearly give the intended intervenor an interest in the originating summons and being the 'the plaintiff' in the SC suit, not only is he entitled to be served with a copy of the originating summons within seven days after the commencement of the originating summons, he is also entitled, as of right, to be made a party and be heard on the matter in originating summons.

THE COURT'S DECISION

[24] For all the reasons aforesaid, I allow encl 8 with costs be in the cause.

Enclosure 8 allowed with costs in cause.

Reported by Dzulqarnain Ab Fatar